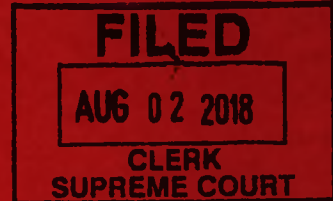


SUPREME COURT OF KENTUCKY
2018-SC-000111-D



RICHARD A. GETTY,
SESAMIE BRADSHAW and
ERROL COOPER

APPELLANTS

v. APPEAL FROM COURT OF APPEALS
CONSOLIDATED CASE NOS. 2014-CA-00686,
2014-CA-00693, 2014-CA-00711 and 2014-CA-00764

BOURBON CIRCUIT COURT
HON. ROBERT MCGINNIS, JUDGE
CONSOLIDATED CIVIL ACTION NOS. 09-CI-00476 and 10-CI-00424

BRENDA SUE BRIDGES GETTY,
CAROLYN CARROWAY,
JOE MAYER and KEVAN MORGAN

APPELLEES

Respectfully submitted,

STOLL KEENON OGDEN, PLLC

A handwritten signature in dark ink, appearing to read "Lucy A. VanMeter", written over a horizontal line.

William M. Lear, Jr.

John W. Bilby

Lucy A. VanMeter

300 West Vine Street, Suite 2100

Lexington, Kentucky 40507

(859) 231-3000 telephone

(859) 253-1093 facsimile

COUNSEL FOR APPELLANTS

CERTIFICATE PURSUANT TO CIVIL RULE 76.12(6)

The undersigned certifies that a true and accurate copy of Appellants' Brief on behalf of Richard A. Getty, Sesamie Bradshaw and Errol Cooper was served upon the following via U.S. Mail postage prepaid this 2 day of August, 2018: Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Leslie P. Vose, Mark L. Moseley, Erin C. Sammons, Gregory A. Jackson, LANDRUM & SHOUSE, 106 West Vine Street, Suite 800, P.O. Box 951, Lexington, KY 40588-0951 as counsel for Appellees and Hon. Robert McGinnis, Special Judge, Bourbon Circuit Court, 310 W. Main Street, Paris, KY 40361 and 775 Johns Road, Butler, KY 41006. The record on appeal was not withdrawn.

A handwritten signature in dark ink, appearing to read "Lucy A. VanMeter", written over a horizontal line.
COUNSEL FOR APPELLANTS

Come now Richard A. Getty, Sesamie Bradshaw and Errol Cooper¹ (hereinafter collectively “Appellants”), by counsel, and pursuant to CR 76.12 and the Court’s Order of June 6, 2018 granting Discretionary Review respectfully submit the following Appellants’ Brief.

INTRODUCTION

This case arises from a will contest action in which a Bourbon County jury reinstated a March 2004 estate plan that left the decedent’s estate in essentially equal shares to his third wife and two children, finding that the testator lacked capacity and acted under the undue influence of his wife when he executed a 2008 estate plan leaving essentially everything to his wife shortly before his death in 2009.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants request an oral argument. The record of the trial court proceeding is voluminous and the issues before the Court turn on whether Appellants presented sufficient facts to support the jury’s verdict in their favor on the issues of unsound mind and undue influence as well as on a claim for misappropriation. In disregard of extensive evidence and with a lack of understanding of the significant proof supporting the verdict, the Court of Appeals erroneously reversed the jury’s verdict on a cold record without the benefit of oral argument. Appellants request an oral argument so that the issues may be presented in their full context to the Court.

¹ Errol Cooper was a long-time friend of Dick Getty and is a party to this action in his capacity as Trustee of the March 22, 2004 Richard J. Getty Living Trust and as Personal Representative and Trustee of the March 22, 2004 Last Will and Testament of Richard J. Getty.

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STATEMENT OF THE CASE

This case arises from a will and deed contest following the 2009 death of Richard J. (Dick) Getty. Appellants prevailed at trial during which the jury heard testimony from 42 witnesses and considered 221 exhibits over the course of 12 days. The jury determined by a **10-2 verdict** that Dick was of unsound mind and, by a **unanimous verdict**, that he acted under the undue influence of his third wife, Sue Getty (Sue), when he made radical changes to his estate plan in October of 2008 that disinherited his son, Rich Getty (Rich), and daughter, Yolanda Richardson (Yolanda) and her child, Sesamie Bradshaw (Sesamie).

Sue prevailed on nearly every material evidentiary ruling that occurred during the trial. She was given free rein to present her defense in the Bourbon Circuit Court. Having lost with the jury, Sue was in the position of appealing the verdict on grounds of palpable error, one of the highest standards of review for a civil case. In overturning the jury's verdict, the Court of Appeals issued a 59-page opinion (Appendix 5) in which it wrongfully reweighed evidence, reassessed the credibility of witnesses and determined in its opinion that a more just outcome would have been for the trial court to direct a verdict in favor of Sue. The law does not permit the Court of Appeals to usurp the role of the jury and engage in functions expressly reserved to the trier of fact. Appellants respectfully request that this Court reverse the Court of Appeals Opinion and reinstate the Judgment of the trial court as to the issues of unsound mind, undue influence and misappropriation and remand the case with instructions to enter Judgment in favor of Appellants as to the Bill of Costs (not awarded to Appellants as the prevailing party) and the Supplemental Judgment (not awarded despite being just equitable relief pursuant to the jury's verdict). Appellants further request that the Court reinstate the Sanction Order entered by Judge

Julia Adams for the bad faith conduct of Sue and her attorneys in destroying critical evidence by cremating Dick's body before an autopsy could be performed and remand the case for entry of attorneys' fees and costs pursuant to that Order.

1. Regency Center, Simi Valley, California

Dick was an attorney who lived in Bourbon County, Kentucky. At the time of his death in 2009, he was married to his third wife, Sue. During the marriage, their household was financially supported nearly entirely through income generated by Dick, either via his law practice or a commercial shopping center he owned in Simi Valley, California called the Regency Center. The Regency Center is a strip mall that has had a number of tenants over the years such as restaurants, an insurance office and a dance studio. Dick built the Regency Center in the 1960s, long before he met Sue, with the help of his then teenage son, Rich, who provided manual labor during construction. (VR 6/14/13: R. Getty 11:18:27-11:19:21) Building the shopping center was a point of pride for Dick and he intended to leave the Regency Center to Sue and his two children, Rich and Yolanda, to provide for them after his death. (VR 6/17/13: R. Getty 11:29:58-11:30:36) Over the years, Dick executed five estate plans, each of which contained this basic plan. (DTE 3, 4, 5, PTE 105, 106, 108, 109)² In addition to being proud of the legacy of the Regency Center, Dick knew that his daughter, Yolanda, had numerous physical and mental conditions and was unable to fully support herself, thereby necessitating that he make provisions for her in his estate plan. (VR 6/14/13: R. Getty 12:19:36-12:20:35) For most of her life, Yolanda lived with Dick or in a small tenant house on Dick's farm and was financially supported by her father. Yolanda predeceased Dick (she died in November of

² Throughout, Appellants refer to Plaintiffs' Trial Exhibit (PTE) and Defendants' Trial Exhibit (DTE) by the number assigned at the trial because these items are not paginated in the Record on Appeal.

2008 after Dick drafted the October 2008 estate plan but before his death in December of 2009) and her daughter, Sesamie, stands in her shoes for purposes of the estate plan.

2. The History Of Estate Planning Documents

Over the course of his life, Dick executed a number of estate planning documents, with each providing for Sue, Rich and Yolanda in essentially equal shares, i.e., 1/3 to Sue, 1/3 to Rich, and 1/3 to Yolanda (or her daughter, Sesamie, if Yolanda should predecease Dick). Estate plans were executed on January 10, 1998, July 27, 2000, April 13, 2002, February 23, 2004 and, finally, on March 22, 2004. (DTE 3, 4, 5, PTE 105, 106, 108, 109)

Per the March 2004 plan, Dick executed a Will, revoking all prior wills, along with a Living Trust Agreement. (PTE 108 and 109; and Demonstrative Exhibit of Estate Planning Documents, RA 11986, 11989, 11992, 11995, 11998, 11999, Appendix 7) It was the March 2004 Trust into which the Regency Center was transferred in August of 2004. (PTE 111) By setting up the March 2004 Trust, Dick took steps to ensure that the Regency Center would be protected for the benefit of his heirs. The March 2004 estate plan was similar to multiple prior estate planning documents executed by Dick over the years, all of which provided for his wife and biological children in roughly equal shares.

3. Dick's Italian Heritage and Personality

Dick was of Italian heritage and people who crossed his path knew of his fiery personality. To say that he used "colorful" language would be putting it mildly. And to say that there was conflict within the Getty family (Dick, Sue, Rich and Yolanda) would also be putting it mildly. Dick and Sue recorded conversations among the family, some of which the jury heard at trial. The recordings documented fights, barbs and foul language exchanged by, between and among Dick, Sue, Rich and Yolanda. (*See e.g.* PTE 4, 5) In

contrast, Dick's grandchild, Sesamie, was not part of these exchanges and had a very loving relationship with her "Grand-pa-pa." The jury heard multiple witnesses describe Dick's personality and heard Dick in his own voice throughout the trial. The jury had an ample opportunity to get to know Dick's nature over decades of his life and knew that he did not hesitate to express his opinion and, in fact, delighted in doing so.

In addition to the audio recordings, Dick liked to draft long letters in which he periodically expressed all manner of displeasure toward his family members and the jury read these letters. (*See e.g.* PTE 2) Rich testified that their Italian heritage played into their banter and that their disagreements would blow up and blow over. (VR 6/17/13; R. Getty 9:22:00-9:22:55) Forensic Psychiatrist Stephen Raffle testified regarding the "confrontatory communication" style of Dick and Rich that involved explosions, dirty language, fights and yelling and discussed professional work on this subject, referring to the "Dance of Anger." (VR 6/20/13; S. Raffle 11:32:22-11:35:27) While shocking to some, this was "normal" communication to them and served to affirm their bond when each remained loyal to the other despite the confrontations.

4. Sue's Longstanding Financial Fraud And Deceit

A. Forensic Accountant Gwen Tilton, Dean Dorton Allen Ford, PLLC

The root of the distrust between Rich and Sue was Sue's long-term financial fraud and deceit. Without Dick's knowledge or consent, Sue spent exorbitant amounts of money that caused Dick to be in a near constant state of financial distress. The financial records were examined and testimony was provided at trial by forensic accountant, Gwen Tilton, of Dean Dorton Allen Ford, PLLC.

As an example, the Regency Center generated approximately \$15,000 in net income per month, more than enough to pay Dick and Sue's living expenses. Yet, they

were overdrawn on their bank account nearly every month from 2004 to 2008 and every month in 2009 due to Sue's financial deceit. (VR 6/24/13: G. Tilton 1:30:16-1:32:05) During the last 3 years the Regency Center was held in Trust prior to Sue's revisions (10/05-10/08), Sue withdrew nearly \$125,000 in *cash* from ATMs for personal use, *an average of nearly \$3,500 per month*, often making multiple withdrawals in a single day. (PTE 122) The overdraft fees alone exceeded \$15,000. (RA 11955-11959, Demonstrative exhibit regarding overdraft/insufficient fund fees, Appendix 8) Forensic accountant Gwen Tilton testified that during the time period of 2004 to 2009, Sue withdrew nearly \$200,000 in cash from ATMs, which withdrawals were over and above the expenditures to pay for household expenses. (VR 6/24/13: G. Tilton 1:39:31-1:47:13; RA 11961-11982, Demonstrative exhibit regarding ATM Withdrawals, Appendix 9). During the time period of 2004 to 2009, nearly \$43,000 was diverted to Sue's son Billy Bridges and another nearly \$60,000 was diverted to Sue's daughter, Carolyn Childress. (PTE 124)

Because the Regency Center was held by the 2004 Trust, Appellants sought a return of the diverted funds via their misappropriation claim. Evidence presented to the jury served the dual purpose of establishing Sue's misappropriation of Trust funds as well as establishing her motive to unduly influence her husband to disinherit his children (i.e., because she could not continue her lavish spending on 1/3 the income of the Regency Center). This proof included *audio recordings* of Sue admitting her own unscrupulous behavior such as lying to her husband about money, use/abuse of prescription drugs, an extra-marital affair, and shocking financial deceit and dissipation of hundreds of thousands of dollars. (PTE 59, 60, 61, 63, 64, 102, Collective Appendix 10) Moreover, the jury knew that Dick never intended the Regency Center and its rental income to be

treated as marital funds – *early on in the marriage he had Sue relinquish her dower interest in the Regency Center* (PTE 144) – yet, Regency Center tenant checks were forged and diverted into the personal bank account of Sue’s daughter and had been converted to Sue’s use or that of her children. In the end, the jury awarded Appellants \$162,500 on their misappropriation claim. (RA 11586-11658, Jury Interrogatory Nos. 7, 8 in the Final Order and Judgment Upon Jury Verdict, entered January 7, 2014)

B. Rich Discovers Major Financial Fraud And Cover-Up By Sue In 2005

Exemplary of Sue’s deceit were actions that came to light in early 2005. At that time, Dick requested that Rich assist with the Regency Center which was in default allegedly as a result of the tenants’ failure to pay in a timely manner. (6/17/13: R. Getty 11:50:00-11:50:58) Rich loaned the necessary funds, remedied the default and, because the annual rents paid by Regency Center tenants at that time should have been more than enough to provide for Dick’s living expenses and other obligations, sought to determine why the tenants were not timely paying their rents and how the Regency Center mortgage had fallen behind. (*Id.* at 11:50:58-11:51:44)

After contacting the tenants and being informed by them that they were current as to all lease payments, Rich obtained copies of the tenants’ rent checks, which revealed that the monthly lease payments by tenants had indeed been made and that Dick’s signature, required to negotiate the checks, had been forged. (*Id.* at 11:55:58-11:58:04) The documents also revealed that a number of these checks had been deposited in the personal bank account of Sue’s daughter and were then converted to her own use or that of Sue. (*Id.* at 12:01:01-12:05:44; PTE 15) Sue **admitted** that persons other than Dick signed his name to rent checks and deposited those funds into other accounts, including Sue’s personal account. (VR 6/26/13: S. Getty 8:44:30-8:45:52) Ultimately, the

investigation revealed that hundreds of thousands of dollars had been diverted from the Regency Center accounts. (VR 6/17/13: R. Getty 1:43:03-1:4605; PTE 15 and 17)

In addition to forging Dick's signature to rent checks and depositing those funds in unrelated accounts, the scheme also involved writing checks to third parties and forging Dick's signature on those checks. (VR 6/17/13: R. Getty 12:09:15-12:13:22) Clearly aware that her actions were fraudulent, Sue attempted to cover up this activity by providing Dick's accountant with photocopies of checks on which she had "whited out" the names of the true payees and written in the names of others in a crude effort to conceal the earlier fraudulent and deceitful conduct. (*Id.* and PTE 17; VR 6/27/13: S. Getty 5:15:40-5:18:50) The checks looked suspicious, causing Rich to obtain copies of the actual checks from the bank. When the "fake" checks were compared to copies of the actual checks obtained from the bank, the attempted cover-up was revealed. (PTE 17; Demonstrative Exhibit of "Real" and "Fake" checks, Appendix 11) Sue ***admitted*** altering the checks by removing the names of payees such as her children and friends and inserting the names of "legitimate" payees such as "Wilson's Drug" (a local drug store) and "St. Joe" (a local hospital). (VR 6/27/13: S. Getty 5:15:40-5:18:50)

These discoveries also sparked Rich's memory about an anonymous voicemail he received in September of 2002 indicating that he should immediately go to the Bourbon Community Hospital, where his father had been taken. (PTE 3 and 6) The anonymous caller relayed her belief that Dick had been given toxic herbs that had made him ill. (*Id.*) Rich later determined the anonymous caller to be Katherine Buckler ("Ms. Buckler"), a family friend who had lived in a trailer with her husband at Dick's Bourbon County Farm. (VR 6/17/13: R. Getty 10:21:55-10:27:55) Rich warned Sue that if she was doing

anything harmful to his father, she should stop. (*Id.* at 10:36:00-10:36:15.) Shortly thereafter, Dick's health and medical condition improved greatly. (*Id.* at 10:36:36-10:36:55) Having remembered this 2002 event in combination with the 2005 financial deceit, Rich asked Ms. Buckler to come to his office to discuss her allegations and she provided a sworn statement at that time. (VR 6/17/13: R. Getty 12:28:15-12:29:30; 1:50:25-1:55:20; RA 3878-3879, Sworn Statement, Appendix 12) According to information provided by Ms. Buckler and other third parties, Sue used funds that she wrongfully converted to purchase illegal prescription pills. (VR 6/17/13: R. Getty; VR 1:56:50-1:57:40; VR 6/19/13: K. Buckler 2:57:33-2:58:16) Simply put, Rich's distrust of Sue sprung from her deceitful actions toward his father and his family.

5. 2008 Guardianship Proceeding

In the fall of 2008, Dick, in his late 80s, was extremely ill, weak, bedridden, heavily medicated with fluctuating mental capacity and confusion, and totally dependent on Sue for his daily personal and medical needs. (VR 6/20/13; S. Raffle 11:21:55-11:22:17)

In September of 2008, Dick was admitted to St. Joseph's hospital and was near death. The differential diagnosis determined that he had suffered an "overdose." (PTE 51) The evidence strongly suggests that the overdose resulted from Sue having given him both Percocet and Roxanol, a liquid form of morphine, despite having been specifically instructed not to do so. (PTE 49 and 50; VR 6/19/13: R. Kuhn 9:52:10-9:53:00; 9:57:30-10:04:35) Unbeknownst to Rich, his father had been admitted as a hospice patient, meaning that he would not receive active medical treatment to counter the overdose. At the insistence of Rich, Dick was removed from the care of hospice and admitted to the "regular" floor so that he could receive more aggressive, life-saving treatment. (PTE 50;

VR 6/17/13: R. Getty 3:33:45-3:37:58) He was given Narcan, an opiate antagonist, at which point his condition improved, and he was eventually discharged. (*Id.*)

Back in the home, Dick, still in a weak, bedridden and heavily medicated condition, was once again totally dependent on his wife for nearly all of his daily personal and medical needs. Faced with Dick's recurring health problems, the previous allegations by Ms. Buckler, Sue's misappropriation of assets, and the Roxanol/narcotic overdose diagnosis, Rich and his sister Yolanda felt compelled to take action.

On or about September 15, 2008, Rich instituted the Guardianship Proceeding in Bourbon District Court in order to prevent Sue from continuing to administer medications to his father and place all financial matters in the hands of a qualified third party. (PTE 28) Attorney Anna Johnson was appointed by the District Court to represent Dick. (PTE 51) Though she was not a party, Sue retained attorney C.V. Collins to represent her therein. (VR 6/17/13: R. Getty 4:08:15-4:08:24)

During a hearing early in the proceedings, evidence was presented regarding the events of the September 2008 hospital stay, including the differential diagnosis of a drug "overdose." (RA 3878-3879, Exhibit 31, Transcript of Hearing in Guardianship Proceeding, Dr. William Gates) Furthermore, a court-appointed Certified Public Accountant filed reports with the Court showing the mismanagement of the Regency Center and the misappropriation of funds belonging to the 2004 Trust. (PTE 121; Report of Marc T. Ray, CPA, Appendix 13) Ultimately, the parties to the Guardianship Proceeding reached an agreement with the resulting order providing that nurses be solely

responsible for administering Dick's medications and that the Regency Center funds be administered by a CPA or bookkeeper.³ (PTE 30 and 40)

6. Execution Of 2008 Estate Plan

Unbeknownst to Appellants, near the end of October of 2008 when the parties were negotiating the terms of the Agreed Order in the Guardianship Proceeding, Dick executed a series of estate planning documents which purported to revoke his 2004 Will and Trust, as well as deeds transferring the Regency Center and the Bourbon County Farm to him and Sue as joint tenants with right of survivorship – effectively removing these assets from his estate so that they would pass immediately to Sue upon his death. (PTE 113, 144, 115, 116, 117)

As established at the trial below, the 2008 changes to Dick's estate plan and transfers of his principal assets were achieved through Sue's manipulation, undue influence, duress and fraud in taking full advantage of Dick's weakened and deteriorating physical and mental health. It was well known that one of Dick's greatest fears was being put in a nursing home, and Sue used that fear to drive a wedge between him and his children. (VR 6/20/13: S. Raffle 1:13:58- 2:02:00) Dick so feared nursing homes that he once told Sue that he would rather die than be placed in a nursing home. (VR 6/27/13: S. Getty 9:05:02-9:07:30) Seizing on this fear, Sue lied to Dick, telling him his son instituted the Guardianship Proceeding in order to "take control" and put him "in a home" when, in fact, Rich's true purpose in initiating the proceeding was to protect his father's

³ Despite these requirements, Sue did not compensate the professional nursing service which had been hired to administer medication to Dick and, instead, reverted to administering the medications herself. (VR 6/18/13: R. Getty 10:32:25-10:32:55) Additionally, no CPA or bookkeeper was ever retained to manage the Regency Center, which allowed Sue to retain effective control over the center's management and accounts. (*Id.*)

health, well-being and financial condition.⁴ (VR 6/20/13: S. Raffle 1:13:58-2:02:00; VR 6/27/13: S. Getty 9:02:03-9:05:30PTE 38 and 39)

Taking advantage of Dick's weakened and heavily medicated condition, and unbeknownst to Rich, Yolanda or Sesamie, Sue achieved a transfer of the primary assets to herself as a joint tenant with right of survivorship while leaving only \$1.00 to Rich and Yolanda (Sesamie stepped into her mother's place when Yolanda died in November of 2008). These documents were prepared by Carolyn Carroway, Sue's attorney.

The Court of Appeals found that the trial court should have directed a verdict for Sue on the claims of unsound mind and undue influence. This would have required the trial court to find a "complete absence of facts" to support the claims of unsound mind and undue influence. As catalogued below and otherwise in this brief and in the record on appeal, there was a mountain of evidence to support the verdict, including:

- A videotape of the 2008 will execution in which Dick appears strapped to a wheelchair in a weak and frail condition. The will is not read to him and there is no discussion regarding why his children and grandchildren have been excluded. (PTE 66) The deed disposing of his primary asset – the Regency Center – was executed off camera and Sue participated in that event.
- The videotape represented "*Take 2*" and possibly "*Take 3*" – the third time that Sue and her lawyers had attempted to get Dick upright and even marginally coherent during this time period. The videotape was "the best of Dick Getty" at this point in his life, yet still reflecting a weakened and confused man led through the process by a lawyer who also represents Sue.
- There was unrefuted evidence that Dick was prescribed dozens of medications and was at the *absolute peak* of his narcotic pain medication intake *at the very*

⁴ The Court of Appeals Opinion notes that Appellants "fail[ed] to explain why it is significant that Anna Johnson... could not recall whether she informed Dick that Rich ... no longer wished to be appointed Dick's guardian." (COA Opinion at 57) The jury, who heard all the evidence, understood this was important because Ms. Johnson's failure to communicate this information allowed Sue to perpetuate the myth that Rich wanted to "take control" of his father's property and place his father in a nursing home (VR 6/20/13: S. Raffle 11:13:30-11:14:49) The Court of Appeals Opinion accepts Sue's version of events hook, line and sinker when it makes a factual finding that Rich "intended to take control of Dick's health care and assets, and to separate Dick from Sue and the residence he shared with her." (COA Opinion at 57)

moment he signed the critical estate planning documents. (VR 6/19/13: R. Kuhn 11:00:32-11:02:51)

- Friend Bill Bishop testified that he visited with Dick on October 5, 2008 and that Dick was under the mistaken impression that Rich was trying to take his property away from him. (VR 6/21/13: B. Bishop 10:33:00-10:43:33) After this visit, the Nurses' Registry⁵ ("NR") notes indicate that Dick said, "Now, I don't know who to believe." (PTE 69)
- No animosity existed between Dick and his granddaughter, Sesamie, and there was no reason to cut her out of the estate plan. Sue deceitfully led Sesamie to believe that Sesamie would inherit a 1/3 interest in the Regency Center to prevent Sue's scheme from being discovered. (VR 6/25/13; Bradshaw at 1:59:30-2:07:56)
- Medical records document a visit with Dr. West on October 9, 2008 with Dick and Sue in which the doctor was told that "Court order was obtained after the son apparently tried to have him removed from the home... The son again has been attempting to get him removed from the home which is the basis for the court action..." (VR 6/20/13: S. Raffle 1:13:58-2:02:00; PTE 38, 39)
- In an Affidavit filed in the Guardianship Proceeding (prepared by Sue's attorney), Dick states that he wishes "to **remain at home** with my wife..." No reason existed for him to include such a statement had he not been told, and believed, that Rich was trying to put him "in a home." (PTE 70)

Notably, on the videotaped execution of the 2008 will, Dick is *completely silent* about the radical change to cut out his children from his estate plan. The well documented history of Dick's no-holds-barred communication style serves to emphasize the marked change in his behavior after the radical revision made to his estate plan. The disposition of property in 2008 was completely out of character for Dick both because it excluded his children and grandchild and because he remained *completely silent* about the change. For a man who expressed himself freely, and did not hesitate to throw barbs and impose criticism, the fact that he remained silent about the change in his estate plan is significant

⁵ As a result of the Guardianship Proceeding, NR provided round-the-clock in-home care to Dick from approximately September 21, 2008 to October 10, 2008 and then intermittent care after October 10, 2008. NR was keeping a handwritten log of events taking place in the Getty home. Entries in the log and other evidence during this time period revealed significant information about Dick's mental status and the attempts to have him execute a new estate plan for the benefit of Sue.

and suggests that he either did not realize a change had been made or he was too ashamed to tell his children what he had done as a result of the undue influence of his wife. (VR 6/20/13: S. Raffle 11:37:10-11:38:15) Dr. Stephen Raffle testified regarding the significance of this change and the jury also knew the importance of Dick's silence because they had heard the testimony and considered the evidence in its full context. The Court of Appeals, which did not even have the benefit of an oral argument, did not.

7. The Civil Litigation

Appellants presented substantial evidence regarding Dick's lack of testamentary capacity including his *obvious mental and physical infirmity* that the jury saw on a *videotape* of the will execution, which was bolstered by *contemporaneous nursing notes* of confusion and disorientation, *medical testimony* regarding Dick's physical and mental condition before and after the execution, expert *pharmacological proof* regarding the precise medications prescribed on the day of the execution and the *effects of those specific dosages*. Evidence of Sue's undue influence included testimony and documentation of nearly all of the badges of undue influence.

Following two years of discovery and thousands of pages of motion practice, this case was tried in Bourbon Circuit Court in the summer of 2013. After careful deliberation, the jury found: (i) by a *10-2 verdict* that Dick was not of sound mind when he signed the 2008 documents; (ii) by a *unanimous verdict* that Sue procured the signing of the 2008 documents through the exercise of undue influence; (iii) by a *unanimous verdict* that Sue misappropriated trust funds for her own purposes. (RA 11586-11658, Jury Interrogatory Nos. 4, 7, 14 in the Final Order and Judgment Upon Jury Verdict, entered January 7, 2014, Appendix 1)

In accordance with the Jury's findings adopted by the trial court, the court then set aside and declared null and void each of the instruments that were part of the 2008 estate plan; reinstated the 2004 estate plan and declared each of the instruments executed in connection therewith to be in full force and effect at law. (*Id.* at ¶¶ 1-6) The Final Order and Judgment also awarded Appellants damages on their misappropriation claim, consistent with the jury's verdict, and on some claims for equitable relief, totaling \$566,091.00, along with recoverable costs and post-judgment interest.⁶ (*Id.* at ¶¶ 7, 13)

ARGUMENT

1. The Trial Court Properly Denied The Motions For Directed Verdict

In holding that the trial court erred by denying Sue's motion for a directed verdict (COA Opinion at 29, Appendix 5), the Court of Appeals invoked a "substantial evidence" standard never before applied to directed verdicts. (COA Opinion at 31-32) This was clearly erroneous pursuant to Civil Rule 50.01 and well established case law. Kentucky has long held that a trial court may not grant a directed verdict unless "there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998). "Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses." *Id.* at 19. "The reviewing court, upon completion of a consideration of the evidence, must determine whether the jury verdict was flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. If it was not, the jury verdict should be upheld." *Id.* This Court recently stated the standard of review as follows:

⁶ The Final Judgment was amended on March 28, 2014 to dismiss the claims against Joe Mayer. (Appendix 3)

Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact.

Indiana Ins. Co. v. Demetre, 527 S.W.3d 12, 25 (Ky. 2017). On appeal to the Court of Appeals, the standard of review is “clearly erroneous” and reversal is permitted only where the verdict was palpably or “flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice.” *Wright v. Carroll*, 452 S.W.3d 127, 132 (Ky. 2014).

A. Sufficient Evidence Supported The Jury’s Verdict That Dick Was Of Unsound Mind

“To validly execute a will, a testator must: (1) know the natural objects of [his] bounty; (2) know [his] obligations to them; (3) know the character and value of [his] estate; and (4) dispose of [his] estate according to [his] own fixed purpose.” *Bye v. Mattingly*, 975 S.W.2d 451, 455-56 (Ky. 1998) (citations omitted). The requisite capacity to make a deed is higher. *Id.* at 455 (“The minimum level of mental capacity required to make a will is less than that necessary to make a deed.”) Of note, the disposition of the primary estate assets – the Regency Center and the Millersburg Road residence – was accomplished by deed and the Court of Appeals did not mention this higher standard of capacity in its opinion. In any event, the evidence submitted by Appellants on the issue of testamentary capacity was more than sufficient to support the jury’s verdict.

i. Dick Did Not Understand The Character And Value Of His Estate

During the videotaped execution of the 2008 will, a discussion occurs wherein Dick states that he has directed Carroway to prepare a trust for Yolanda and Sesamie.

(PTE 66) Not only does this statement indicate that the estate plan does not reflect his wishes to provide for Yolanda and Sesamie, but Dick's request is notable because he signed other documents on the same day that completely divested his estate of his primary assets, the Regency Center and his residence.⁷ (PTE 114, 115, VR 6/28/13: C. Carroway 11:18:02-11:20:00) In other words, the deeds *left nothing in Dick's estate that could have been placed in trust for the benefit of Yolanda and Sesamie*, therefore demonstrably showing that he did not understand the character and value of his estate.

Following the execution, Dick made other statements establishing that he did not know or understand that he had signed estate planning documents leaving the entirety of his estate to Sue. Dick told his granddaughter Sesamie that he had provided for her and her daughter, which was the opposite of what he had actually done.⁸ (VR 6/25/13: Bradshaw at 1:36:40-1:38:00; 1:48:44-1:49:49) There was no animosity between Dick and Sesamie and he had no reason to exclude her from the estate plan. What the jury knew, and Dick did not, was that after terminating the 2004 Trust and deeding the Regency Center and house to himself and Sue jointly, he had no assets left to give to Sesamie. By their very nature, these facts indicate Dick did not understand the character and value of his estate and did not dispose of his estate according to his own fixed plan.

ii. Medical Evidence

Dr. Stephen Raffle testified that during October of 2008, Dick was bed bound and suffering from dehydration, chronic pain, constipation and fluctuating mental capacity

⁷ The jury also heard Carroway, who represented Sue and Dick at different times and sometimes simultaneously, initially deny that Dick asked her to prepare a trust for Yolanda and Sesamie even though this clearly occurs on the videotape. (VR 6/28/13: C. Carroway 11:18:16-11:19:20)

⁸ The Court of Appeals' treatment of this conversation is illustrative of its approach to the evidence. Appellants offered it to demonstrate, and the jury could appropriately have concluded, that Dick did not appreciate what he had done with the 2008 deeds, will, and Trust revocation. The Court of Appeals dismissed that interpretation and concluded it only showed that Sesamie was not denied access to Dick.

due to confusion and disorientation brought on by narcotic medications. (VR 6/20/13: S. Raffle 10:24:10-10:26:40) His physical condition was such that there 30 Emergency Medical Service runs in 2008 alone. (DTE 28) The list of prescribed medications from this time period is astounding and contains dozens of medications, any number of which alone have a profound impact on cognitive functioning. (PTE 56, Appendix 14) Evidence of excessive drug use is relevant to the issue of whether a testator had the capacity to execute a will. *See Osborn v. Paul*, 114 S.W.2d 1134 (Ky. 1938) (will invalidated on ground of incapacity supported by evidence of excessive use of alcohol); *Duval v. Duval*, 60 S.W.2d 351 (Ky. 1933).

Contemporaneous notes made by Nurses Registry (“NR”) around the time of the estate plan execution established that Dick was severely impaired by the administration of narcotic pain medication to the point where he did not understand basic information needed to make decisions for himself. NR notes dated August 26, 2008 document an altered mental state and confusion associated with dehydration, a chronic problem from which he suffered. The NR Notes state that Dick **thought the year was 1954**. (PTE 48 (emphasis added)) On September 27, 2008, a NR note states: “...**Attorney unable to get statement because Mr. Getty was too sleepy and appeared to be disoriented as a result of pain med given at 3 p.m....**” (PTE 132 (emphasis added)).⁹ Another NR note dated September 20, 2008 indicates that attorney Kevan Morgan came to the Getty home to make changes to Dick’s estate plan. On that occasion, Dick executed a Revocation of his **February 2004** Trust. This shows Dick was not of sound mind nor coherent enough to

⁹ A nurse, Marie Cameron, testified that the “attorney” was Kevan Morgan and that Mr. Morgan may have videotaped Mr. Getty signing documents on two occasions. (VR 6/25/13: Cameron at 3:29:27-3:34:53) No such videotape(s) were ever produced and Attorney Morgan provided conflicting testimony about whether such a tape ever existed. (PTE 130 VR 6/25/13: K. Morgan 9:24:50-9:31:20)

realize that the February 2004 Trust was not his most recent estate plan, failing to recognize that he had replaced the February 2004 Trust with the March 2004 Trust. (PTE 32 and 126) On September 28, 2008, a NR note states that “**Mr. Getty is disoriented does not know where he lives or where he is, month, season, thinks he is going to Lexington this morning....**” (PTE 133 (emphasis added))

On October 27, 2008—the day the will and other estate planning documents were executed, contemporaneous NR notes show Dick was prescribed Endocet 10 mg (every three hours as needed) and Oxycontin 40 mg (morning and night). According to Appellants’ expert, Dr. Robert J. Kuhn, a University of Kentucky Pharmacologist, both medications profoundly impair cognitive functioning, and Dick was on the *highest dosages of his life* when he executed the critical estate planning documents on October 27, 2008 and when he executed an Affidavit prepared by Carroway on August 3, 2009.¹⁰ (VR 6/19/13: R. Kuhn 11:00:32-11:02:51) As explained by Dr. Kuhn, Dick’s historical dosage of narcotic pain medication from 2002 to 2007 was below the threshold of the average person, but it spiked in 2008 to never before seen highs as indicated in the charts attached as Appendix 15. (VR 6/19/13: Kuhn 9:31:04-9:38:38; Demonstrative Exhibit Entitled Daily Opioid Dosages, RA 11954). Dr. Kuhn explained that prescribing a high dosage of narcotics following a period of low dosage, as was the case with Dick, would result in even greater cognitive deficiency. (VR 6/19/13: R. Kuhn 9:38:55-9:40:17) Dick’s dosages of narcotic pain medication at the *precise time* the estate planning

¹⁰ Without being asked to do so by Dick, Carroway prepared an Affidavit in May 2009 but did not have Dick execute the Affidavit until August 2009 when his dosage of narcotic pain medication was once again at or near the same peak level it reached in October 2008 when the estate plan was executed and at a time when she was representing Sue as well. (VR 6/28/13: C. Carroway at 11:27:12-11:29:00; PTE 147)

documents were executed in October of 2008 and August of 2009 were at all-time highs.¹¹

Although the medications were supposed to be kept under lock and key and administered only by NR, at least one nurse, Lorie Turetzky, permitted Sue to have extra medication in her possession and another nurse, Marie Cameron, testified that she told Sue where to find the key. (VR 6/27/13: Turetzky at 12:21:52-12:25:08; VR 6/25/13: Cameron at 3:08:00-3:09:32) Not only did Sue participate in the execution of the new estate plan, but she had access to the narcotic medication that she knew would impair Dick's cognitive ability. The jury saw first-hand on the videotape the effects of those medications.

Appellants also presented evidence comparing Dick's signature on various documents signed at different, relevant points in time, allowing the jury to see the marked deterioration in his signature around the time of the execution of the 2008 estate plan. (RA 11983, Appendix 16) For one "signature," Dick's name was a mere dot. (*Id.*)

Carroway testified that one of the deeds Dick signed on October 27, 2008 was flawed in that it was missing an in-care-of-tax mailing address. Rather than have Dick sign a corrected document, she altered the document without Dick's knowledge and then filed it of record. (*See e.g.* PTE 153, 115; 6/28/13: C. Carroway 11:20:00 -11:22:00) It is reasonable to conclude that Carroway altered the document rather than have Dick sign a new, corrected document because Dick was no longer in a highly medicated and unsound state of mind and, therefore, might not have consented to the request.

¹¹ Medical records indicate that Dick was so disoriented on October 21, 2009 (about six weeks after he executed the Carroway Affidavit) that he believed he had two daughters instead of a son and a daughter. (PTE 74) If one does not know the natural object of his bounty, one lacks capacity to make a will. *Bye*, 975 S.W.2d at 455-56.

The jury heard and considered Appellants' relevant evidence from medical experts as to how Dick's escalating prescription drug dosage and his deteriorating medical condition affected his capacity on the day he signed the estate planning documents. *See Fisher v. Heckerman*, 772 S.W.2d 642, 645 (Ky. App. 1989) (trial court abused its discretion by excluding medical evidence of effect of psychoactive drugs on testator). The Court of Appeals improperly weighed the evidence and found that no "habitual use of substances resulted in a fixed and constantly impaired mental state 'down to the day of the will's execution.'" (COA Opinion at 32, citing *Warnick v. Childers*, 282 S.W.2d 608, 609 (Ky. 1955)) Notably, in *Warnick*, the Court **upheld the verdict** of the jury because the evidence, while conflicting, was sufficient to support the verdict. Here, Appellants **did** present evidence that using narcotic pain medication rendered Dick of unsound mind "down to the day of the will's execution" – specifically the testimony of Dr. Kuhn regarding the effect of the dosages prescribed to Dick **on the day the estate plan was executed** and **the videotape of the will execution** which documented Dick's condition **at the very moment** the will was signed. Moreover, following the execution, Dick told Sesamie that he had provided for her and her daughter, which was the opposite of what he had actually done, clearly showing he was not of sound mind when he signed the documents. (VR 6/25/13: Bradshaw at 1:36:40-1:38:00; 1:48:44-1:49:49)

iii. The Videotape

With the background of Dick's bombastic personality, and the knowledge that he was on an all-time high dosage of narcotic pain medication, the jury watched the will execution video which affirmatively shows the following:

- A ***weak and frail*** Dick strapped into a wheelchair responding to leading “yes”/“no” questions posed by Carroway;
- Dick has no reaction to a loud, ringing telephone;
- Carroway stating at the outset that she met with Dick last week and that he still wishes to proceed with the signing of the will, even though ***he has directed her to prepare a trust for the benefit of his daughter Yolanda and his granddaughter Sesamie, a clear indication that the estate plan did not reflect his true testamentary intent;***
- Despite the discussion wherein Dick indicated that he has directed Carroway to prepare a trust to provide for Yolanda and Sesamie, ***no such trust was ever prepared by Carroway, and, even if she had followed through with his wishes, the other documents Dick executed on that same day – the execution of which was not videotaped – left nothing in his estate that could have been placed in trust for the benefit of Yolanda and Sesamie.*** (VR 6/28/13: C. Carroway 11:18:16-11:19:20);
- Dick has trouble signing his name, and ***Carroway hovers over him and appears to guide his hand;***
- Dick responds to Carroway as “yes sir”;

(PTE 66) The Court of Appeals dismissed this evidence, claiming it merely established Dick was “old” and that “if he decided to establish a trust for Yolanda and Sesamie, he would revise his estate documents later.” (COA Opinion at 40-41) In other words, the Court of Appeals believed there is but one interpretation of this evidence – its own – and that any interpretation concluding this is evidence of unsound mind is “neither a fair nor reasonable inference.” (*Id.* at 41) In so holding, the Court of Appeals massively overstepped its bounds and this Court should restore the jury verdict and the trial court’s Judgment.

The videotape is also notable for what it does ***not*** show:

- The ***will is not read to Dick***, nor are its specific terms discussed in detail beyond Carroway’s statement that the will provides for Dick’s estate to pass to Sue and, if Sue dies before him, to her children. ***There is no discussion of what property is included in the estate nor that the major assets are being divested from the estate;***

- There is no mention of Rich or of the fact that the will excludes Dick's biological children and grandchildren. ***Dick is not asked the critical question regarding why the plan excludes his biological children and grandchildren;***
- ***There is no acknowledgement or discussion of the fact that Dick's primary asset, the Regency Center, will not pass by the will due to the fact that it was transferred by separate document to Dick and Sue, giving them joint ownership with right of survivorship;***
- The ***video does not show the execution of the deeds which convey Dick's most valuable assets, the Regency Center and the Bourbon County farm.*** Since all these documents were executed on the same day, the jury had to wonder why the execution of these documents was not recorded as well.

Appellants presented the testimony of Dr. Stephen Raffle, a medical doctor and one of only about 1000 board certified forensic psychiatrists in the United States, who explained the relevance of the omissions from the videotape. (VR 6/20/13: S. Raffle 9:19:30-9:21:05) Dr. Raffle has been involved in more than 50 estate planning cases performing medical examinations of testators prior to execution of documents. (VR 6/20/13: S. Raffle 9:38:15-9:38:35) Dr. Raffle testified that his examinations are videotaped, and he explained the importance of asking the critical questions "on the record" and in a manner that requires the person to explain their understanding of the will:

What I'll do initially is I'll ask them what is their understanding of the will, what do they understand that the will provides for? And then I will ask them a global question – "Tell me why you've decided not to give part of your estate to a particular individual who might otherwise get a piece." I try to make the questions non-directive, to make them not questions that can be answered "Yes" or "No," but where they have to explain the logical processes by which they made their decision.

*** **

In the process of the narrative, I am able to obtain information from the person about why they make a decision that they make.

(*Id.* at 9:46:24-9:47:25; 10:12:45-10:13:09) Dr. Raffle found it significant that there is no explanation or discussion regarding why the will does not include provisions for Dick's son and daughter. (*Id.* at 10:11:05-10:11:39) It was also significant to Dr. Raffle that Sue, the primary caregiver, was present when the Will was signed, "because if a person is being unduly influenced by an individual who is present at the signing of the will ... then they have a direct opportunity to continue to influence the person's actions by making sure that they don't say anything that might be indicative that they have been influenced. It limits the person's ability to talk freely and confidentially with their lawyer."¹² (*Id.* at 10:09:41-10:10:27) Dr. Raffle described Dick as "very blunt, incisive and at times quite angry man who didn't pull any punches" and found it notable that Dick was never given the opportunity to state why his children were excluded from the estate plan. (*Id.* at 10:16:04-10:18:02)

The Court of Appeals contorted Appellants' proof and stated that Appellants argued that "no one has capacity to execute a will, or any other legal instrument, unless: (1) The instrument is first read aloud in its entirety; (2) the individual ... answers a series of questions... and (3) those events... are recorded." (COA Opinion at 41) Appellants never made such an argument. The fact that Carroway chose to videotape the will execution only (and not the deeds), and that the will is not read aloud to Dick, raised a material question of fact regarding whether Dick even read the documents or understood their import (and statements Dick made to Sesamie after the fact suggest he did not).

¹² The Court of Appeals found Sue's presence "irrelevant," apparently disregarding entirely Dr. Raffle's testimony. (COA Opinion at 42) The jury was entitled to reach a different conclusion regarding Sue's presence, particularly given that participation by a beneficiary is a specified badge of undue influence. *Bye*, 975 S.W.2d at 457.

Moreover, because Sue and Carroway anticipated a will contest, the jury had to wonder why Carroway went to the trouble of making a videotape but failed to ask the single most important question: *Why have you cut your children and grandchildren out of your estate plan?* The clear implication is that she did not ask the question because Dick did not have the capacity to understand the documents he signed in October of 2008 and did not have the capacity to provide an answer to the question. Considered in context with Dick's well documented history of speaking his mind, the jury was free to consider this evidence of unsound mind.

The Court of Appeals further spun the issue by incorrectly stating that Appellants' argued that "Sue was not entitled to a directed verdict ... because Sue failed to have Dick examined by a physician on October 27, 2008 to prove Dick was not "over-medicated." (COA Opinion at 30-31) To be clear, Sue and Carroway anticipated a will contest, yet chose not to have a physician examine Dick on the date in question. While this was not Sue's "burden of proof," her failure to take this step with the full knowledge that competency would later be questioned was worthy of consideration by the jury. Dr. Raffle testified that his practice is to obtain such an examination when a will contest is anticipated, and the jury was entitled to consider this fact. Rather than give required deference to the jury which considered this evidence in context, the Court of Appeals made its own judgment that the evidence was "irrelevant." (COA Opinion at 41-42)

B. Sue's Evidence

The Court of Appeals cited to some of "Sue's evidence" including the report of an Interdisciplinary Team appointed to evaluate Dick in the 2008 Guardianship Proceeding, testimony from Dick's treating physicians, and the Order entered by the parties in the

Guardianship Case. (COA Opinion at 29-30) A few things should be noted about this evidence which was considered, and rejected, by the jury.

i. The Interdisciplinary Team Report

The Court of Appeals was moved by an October 24, 2008 report of an Interdisciplinary Team finding Dick to be “competent.” (COA Opinion at 29) This report was not conclusive of the issue. In fact, none of the members of the interdisciplinary team were even called to testify at the trial and none examined Dick on the day the estate planning documents were signed.¹³

Second, the team was evaluating competency in the traditional sense, *i.e.*, disability or partial disability, and whether he needed a court appointed guardian or conservator. *See, e.g.*, KRS 387.530 – .540. The report concluded that at that time Dick was “able to seek appropriate assistance for activities of daily living... [and seek assistance] to manage financial affairs.” (DTE 25) The team noted that Dick had private nursing care on a daily basis and they further recommended that he have a power of attorney. (*Id.*) In other words, it was the opinion of the Interdisciplinary Team that, on his **best day** and when he was not disoriented by pain medication, Dick needed considerable assistance to manage all aspects of his life, including transportation, appointments, hygiene, nutrition and finances. (*Id.*)

What was at issue in the underlying case, however, was the extent to which the various medications and other substances being administered to Dick impaired his faculties. There was considerable evidence that Dick was confused and disoriented during the relevant time period as a result of his narcotic medication and the jury was entitled to weigh and consider this evidence.

¹³ The evaluations were conducted on October 9, 2008 and October 24, 2008. (DTE 24, 25)

ii. The Medical Testimony

The Court of Appeals noted that Dick's personal physicians believed him to be "competent." (COA Opinion at 30) While Sue presented medical testimony from treating doctors, none of the physicians examined Dick on the day the critical documents were signed. (VR 6/19/13: Kuhn at 12:18:48-12:19:57 (emphasis added)) While these doctors testified that Dick was generally "competent," the jury correctly recognized that various medications and other substances administered to Dick impaired his cognitive abilities and, thus, affected his testamentary capacity at the time he signed the critical documents.

iii. The Guardianship Order

Sue argued, and the Court of Appeals apparently agreed, that an Agreed Order dismissing the Guardianship Proceeding was "better" evidence of competency than Appellants' evidence. (COA Opinion at 29) The Agreed Order had nothing to do with testamentary capacity. (PTE 40) The Agreed Order was simply a settlement agreement among the parties to the Guardianship Action which provided that nurses be solely responsible for administering Dick's medications and that the Regency Center funds be administered by a CPA or bookkeeper in order to put safeguards in place to protect Dick. (*Id.*) To the extent it is relevant, the Agreed Order establishes that Dick was not capable of managing his health or finances and that he required professional assistance for those things. Moreover, Sesamie Bradshaw and Errol Cooper were not parties to the Guardianship Proceeding and they cannot be bound by the terms of an order entered therein which they did not consent to or sign. *Goldsmith v. Allied Bldg. Components*, 833 S.W.2d 378, 380 (Ky. 1992) (refusing to apply the doctrine where "the source of the claimed judicial admission is a separate lawsuit involving some, but not all, of the parties to this litigation.").

That the Court of Appeals believed that Sue should have won, or that her evidence should have been viewed more favorably than Appellants' evidence, was not grounds upon which to reverse the decision of the jury after the extensive evidence had been heard by them. Accordingly, this Court should reverse the Court of Appeals and reinstate the jury verdict and Judgment of the trial court as to the issue of unsound mind.

2. Sufficient Evidence Supported The Jury's Verdict As To Undue Influence

"Undue influence is a level of persuasion which destroys the testator's free will and replaces it with the desires of the influencer." *Bye*, 975 S.W.2d at 457 (citations omitted). "It is well settled law that ... influence that results in the execution of a will which is not in truth the free expression and desire of the maker **may be proved by a chain of circumstances.**" *Marcum v. Gallup*, 237 S.W.2d 862, 865 (Ky. 1951) (emphasis added). As stated by this Court:

To determine whether a will reflects the wishes of the testator, the court must examine the indicia or badges of undue influence. Such badges include a physically weak and mentally impaired testator, a will which is unnatural in its provisions, . . . participation by the principal beneficiary in the preparation of the will, possession of the will by the principal beneficiary after it was reduced to writing, efforts by the principal beneficiary to restrict contacts between the testator and the natural objects of his bounty, and absolute control of testator's business affairs.

Bye, 975 S.W.2d at 457 (citations omitted). No single badge of undue influence, each of which may be inferred from circumstantial evidence, is conclusive. *Amos v. Clubb*, 268 S.W.3d 378, 381 (Ky. App. 2008). Instead, the evidence presented on the different badges must be considered cumulatively, taking into account the totality of the circumstances. *Welch's Adm'r v. Clifton*, 172 S.W.2d 221, 223 (Ky. 1943). "When undue influence and a mentally impaired testator are both alleged and the mental impairment of the testator is proven, the level of undue influence which must be shown is less than

would normally be required since the testator is in a weakened state.” *Bye*, 975 S.W.2d at 458 (citations omitted). “*When slight evidence of the exercise of undue influence and the lack of mental capacity is coupled with evidence of an unequal or unnatural disposition, it is enough to take the case to the jury.*” *Burke v. Burke*, 801 S.W.2d 691, 693 (Ky. App. 1990) (quoting *Gibson v. Gipson*, 426 S.W.2d 927, 928 (Ky. 1968)) (emphasis added).

Accepting as true the overwhelming evidence Appellants presented regarding undue influence, and giving Appellants every fair and reasonable inference that can be drawn from the evidence, the evidence on the issue of Sue’s undue influence of Dick was more than sufficient to support the jury’s verdict. The Court of Appeals took 15 pages to explain why it was more persuaded by Sue’s evidence than by Appellants’ proof. (COA Opinion at 42-58) The Court of Appeals’ Opinion was well outside the bounds of established jurisprudence and was completely indefensible.

Appellants presented evidence at trial regarding each of the applicable badges of undue influence.

A. Physically Weak And Mentally Impaired Testator

The Court of Appeals was forced to concede that the first of the classic badges of undue influence was present – a physically weak, mentally impaired testator. (COA Opinion at 44)

B. Unnatural Will

As to the second badge – a will unnatural in its disposition - the Court of Appeals acknowledged this is a *factual inquiry* (COA Opinion at 45), but then made its own “finding” that the disposition was not unnatural, citing primarily the belief that “Dick told Rich and Yolanda... that if they ever filed guardianship proceedings against him, he

would disinherit them.”¹⁴ (COA Opinion at 47) By contrast, the jury knew that Dick had a long history of saying things he did not mean. Sue’s own brief referenced a letter dated June 19, 1996 wherein Dick told his son, “I am in the process of drafting my will. Needless to say, I won’t be leaving you anything.” (PTE 2) Thereafter, Dick executed five wills, each providing for Rich. (DTE 3, 4, 5, PTE 105, 106, 108, 109) The jury heard many examples of harsh things said by Dick that would be forgotten or forgiven in short order. It was *for the jury* to consider whether the will was unnatural given the specific circumstances of this case not based on any one statement.

In this circumstance, Dick’s estate plan was unnatural in its disposition because it excluded his biological children/grandchildren and was a radical departure from every prior estate plan that left his property in roughly equal shares to his wife and children. “The validity of the explanation of the unequal or unnatural disposition [in a will] is a matter of which the jury must be convinced by the testimony offered by [propounder of the will],” which, in this case, was Sue. *Gibson v. Gipson*, 426 S.W.2d 927, 929 (Ky. 1968). In this action, as in *Gibson*, the jury rejected the explanation, presumably because “other factors demonstrate[d] an unacceptable and unnatural disposition of [Dick Getty’s] estate.” *Burke*, 801 S.W.2d at 694.

Sue relied on *Golladay v. Golladay*, 287 S.W.2d 904, 905 (Ky. 1955), in which the Court of Appeals held that a testator’s will leaving substantially everything to his wife of 37 years did not constitute an “unnatural” or “grossly unequal” disposition for

¹⁴ To the extent the guardianship proceeding angered Dick, the Court completely disregarded the evidence that Sue *purposefully misrepresented* to Dick that his son, Rich, filed the action to “put Dick in a home” rather than for the actual purpose, to ensure that medications would be administered by a nurse to prevent another overdose at the hands of Sue and to protect his father’s assets from Sue’s wastefulness and deceit. Sue’s misrepresentation on this front is documented in the contemporaneous notes kept by Dick’s physician, the testimony of Bill Bishop and the Affidavit prepared by C.V. Collins. (VR 6/20/13: S. Raffle 1:13:58-2:02:00; PTE 38, 39)

purposes of undue influence. Unlike in *Golladay*, where the wife helped and worked with the testator for 37 years, going from being in debt to accumulating a modest estate, Sue did not contribute to Dick's estate but, rather, squandered and depleted it. Dick's 2008 estate plan was unnatural in its disposition because it disinherited his children and grandchildren, and was contrary to the testamentary intent expressed by Dick *in each and every prior estate plan*. Moreover, there was evidence that Dick intended to include his children and grandchildren in his estate plan, even **after** the event that Sue claimed caused Dick to execute his 2008 estate plan, *i.e.*, the Guardianship Proceeding. (*See, e.g.*, the discussion of providing for Yolanda and Sesamie on the will execution video and Sesamie's conversations with her grandfather wherein he believed he had made provisions for her in his estate plan (VR 6/25/13: S. Bradshaw 1:36:40-1:38:00; 1:48:44-1:49:49)) None of the cases cited by Sue or the Court of Appeals involved a situation like this one upon which the jury based its verdict where the testator had expressed his wishes to divide his estate in equal shares between his wife and children in five (5) prior estate plans, making the disposition in the disputed plan per se unnatural.

C. Participation By The Principal Beneficiary

As to the next badge – participation by the principal beneficiary – the Court of Appeals incorrectly stated that “nothing reflects Dick's [estate plan was] drafted at Sue's insistence.” Opinion at 51. In reality, the 2008 will and deeds differed from Dick's five prior estate plans in at least five ways that strongly suggest Sue was behind the revisions: (1) she got everything; (2) despite a long-standing desire to have his remains interred in Pennsylvania with his *former wife*, Carol, (DTE 3, 4, 5, PTE 105, 108) Carroway's will (PTE 113) contained no such provision regarding internment with Carol and left this decision to the sole discretion of Sue (VR 6/28/13: C. Carroway 11:16:00-11:18:02 and

11:32:40–11:34:45); (3) despite an *unwaivering* desire to be cremated, Carroway’s will failed to address it¹⁵; (4) the evidence suggested that Carroway was getting her direction from Sue and not Dick; and (5) Sue literally participated in the execution of the estate plan.

As it related to Dick’s multi-million dollar estate plan, Carroway took only 5 lines of notes totaling approximately 20 words regarding the plan’s contents, clearly suggesting that she was getting her primary direction elsewhere. (VR 6/28/13: C. Carroway 10:39:15–10:42:37, PTE 151 (“In terr. clause. Rev. of docs. All to spouse→stepchildren. Major conflict with son and daughter. Cremation-strong desire”)) Carroway’s invoice contains entries documenting her consultations with Sue and Sue’s attorney, C.V. Collins, in the fall of 2008 although she made no notes of her conversations. (PTE 150, RA 6/28/13: C. Carroway 11:01:40-11:02:00)

The evidence showed that Carroway was acting against the interests of her purported client, Dick, and as an advocate of her current client, Sue, to cause a change in the estate plan to benefit Sue. Despite a CPA report filed in the Guardianship Case critical of Sue’s use of Dick’s money, Carroway never investigated those allegations because Dick believed the information in the report to be a “set up” directed at Sue. (RA 6/28/13: C. Carroway 11:02:00-11:07:50) The jury knew the financial improprieties in the CPA report were factual and, to the extent Dick thought otherwise, he was being

¹⁵ While Carroway subsequently prepared a cremation authorization that she had Dick sign on or about August 3, 2009, the cremation authorization gave Sue full authority regarding final arrangements, including disposition of Dick’s ashes. (VR 6/28/13: C. Carroway 11:11:41 – 11:16:00, PTE 113). Thus, there was nothing in writing to guarantee that Dick’s longstanding wish to be interred next to his former wife, Carol, in Pennsylvania would be honored.

misled and unduly influenced by Sue, which was perpetuated by Carroway's loyalty to Sue.¹⁶

No question exists but that Carroway represented Sue prior to Dick's death, including when Carroway unilaterally decided to have Dick execute the August 3, 2009 Affidavit regarding his estate plan. (PTE 147) In addition, her file contained time entries suggesting that she considered Sue to be her client in the fall of 2008 when the estate plan was altered. Of note, Carroway's invoice contains an entry on November 25, 2008 – the day Yolanda died - stating "Consultation with client; review of joint tenancy issues." (PTE 150) Although Carroway refused to admit this on the stand, the jury could have concluded that the most likely person to call with questions about joint tenancy of the Regency Center on the day Yolanda died (and identified on the invoice as the "client") was Sue. (6/28/13: C. Carroway 11:23:44-11:26:08) It was undisputed that Dick was so devastated by the untimely and unexpected death of his daughter that he had to be taken by ambulance to the hospital. (RA 6/27/13: S. Getty 9:22:10 to 9:22:54)

Finally, Sue literally participated in the execution of the estate plan. The Court of Appeals minimized the evidence that Sue was present at the will execution by describing her as "hand[ing] Dick a tray." (COA Opinion at 51) The fact that Sue can be seen on the videotape "hand[ing] Dick a tray" is important because Sue denied she was present in the room when the videotape was made. (RA 6/27/13: S. Getty 9:19:29 to 9:22:10) Carroway's assistants identified Sue and her voice at different points in the video, and Sue had to sign the deeds that were executed on that day, removing any doubt as to

¹⁶ Moreover, the Northern Kentucky banker, Joe Mayer, who was named co-executor of Carroway's 2008 will along with Sue (PTE 113), was the same banker who aided and abetted Sue's financial recklessness and accumulation of massive overdraft fees by advancing funds to cover overdrafts and failing to look into the troubled state of the account. (See RA 6/21/13: J. Mayer at 2:43:10 to 3:13:56; 3:33:36 to 3:50:10)

whether she participated in the execution of the 2008 estate plan. (VR 6/28/13: K. Gross 1:43:15-1:43:35; VR 6/28/13: P. Steinke at 1:29:24-1:30:00; PTE 153)

The jury could see from the totality of the evidence that Carroway was an ally of Sue and was working to perpetuate Sue's wishes as to Dick's estate. It is clear from the verdict that the jury did not find Carroway to be a credible witness.

D. Efforts To Restrict Contact With Testator

There was unquestionable evidence of the next badge - Sue's efforts to restrict contact with Dick - including letters threatening Rich with criminal charges if he attempted to visit his father. (PTE 33, 41) The Court of Appeals drew its *own inference*, noting that there *might* be a different *interpretation* of the letters, including that they *might have been* posted at Dick's request based on testimony of Sue's attorneys. (COA Opinion at 52-53) Leading up to and at the time of deed and will execution, Dick was completely surrounded by Sue and a coterie of her supporters. Rich and Yolanda were told to stay away. That is the definition of isolation.

The jury heard testimony from the NR nurses relating to Sue's manipulation of them regarding the motives of Dick's children, specifically testimony about Sue's false statements that she was without funds to purchase medications because Rich had "closed" their bank accounts. (VR 6/25/13: M. Cameron 3:53:01-3:55:16; VR 6/27/13: L. Turetzky 12:01:30-12:14:40) Sue manipulated the nurses in order to use them in her scheme to restrict contact between Dick and his children. The NR log documented that the nurses, who were allies of Sue, would hang up on Yolanda when she called, and one of the nurses recorded an incident where Sue asked her to lie to Rich and tell him Dick was "too sick to see anybody." (PTE 69)

Sesamie Bradshaw testified about conversations she had with Sue wherein *Sue deceitfully led Sesamie to believe that “the three of them” (referring to Sue, Rich Getty and Sesamie) would find a way to work together to manage the Regency Center once Dick passed away*, even though Sue knew at that time that Sesamie had been disinherited by the 2008 estate plan. (VR 6/25/13: S. Bradshaw at 1:59:30 – 2:07:56) The clear purpose of this conversion was to ensure that Sesamie believed she was included in her grandfather’s estate plan and would not raise the topic with him.

The jury considered this and other evidence presented over the course of three weeks. The Court of Appeals did not have authority to take the case from the jury after the fact because it disagreed with the inference to be drawn from this evidence.

E. Absolute Control Of Affairs

As to the final badge – absolute control over the testator’s affairs – the evidence demonstrated that Dick was bed bound and that Sue was in control of his housing, his assets, access to him, his money, and all communications from Carroway about the estate plan, and was making misrepresentations to Dick about the guardianship case to drive a wedge between Dick and his children in order to isolate and control him. The evidence established a long and well-documented history of Sue intercepting Dick’s mail and phone calls in order to maintain control over his finances and affairs. (VR 6/19/13: K. Buckler 2:54:45 – 2:56:20) This practice was even more rampant during the time period when the estate plan was altered and Dick was bed bound. Carroway testified that in October 2008, Dick told her that Rich had “closed down” Dick’s bank account and Dick did not know where his money was located and, further, that Dick wasn’t able to pay his bills. (RA 6/28/13: C. Carroway 10:49:00-10:59:24) In fact, the money was with a court appointed CPA, Marc Ray, and Sue had been regularly cashing checks from that

account to pay household bills with oversight by Mr. Ray. (*Id.*) In other words, Dick was being lied to about where his money was located and was under the mistaken impression that he was unable to pay his bills because of Rich's actions when, in fact, the court appointed CPA was managing and protecting his money, all of which information was known to Sue. (*Id.*) The obvious implication is that Sue was lying to her husband to isolate him from his children and maintain absolute control over his affairs. (*Id.*) The videotape documented a weakened Dick signing the will, Sue watching just off camera, and Sue's attorney hovering over Dick, all inhibiting Dick's ability to talk freely. This was evidence that Sue exercised absolute control over Dick's business affairs.

Distilled to its essence, the Court of Appeals' Opinion on the issue of undue influence does not actually involve a lack of evidence supporting same; rather, the Court of Appeals simply disagrees with the jury's weighing of the evidence in Appellants favor instead of Sue's. This falls far short of the grounds required to reverse a jury verdict and this Court should reinstate the verdict of the jury.

3. The Trial Court Properly Allowed The Jury To Consider Evidence Of Sue's Misappropriation Of Funds From The 2004 Trust

The Court of Appeals reversed the jury's verdict¹⁷ on the misappropriation claims against Sue and entered judgment in Sue's favor.¹⁸ In doing so, the court: (i) evaluated the misappropriation claims against Sue under a legal theory never asserted by

¹⁷ In the appeal before the Court of Appeals, Sue argued that Rich lacked standing to maintain his misappropriation claims against Sue. The Court of Appeals did not address this argument in its Opinion. Nevertheless, it should be unquestionable that Rich, as co-trustee of the March 2004 Trust and as co-executor of the 2004 Will, certainly has the right to assert claims on behalf of both the March 2004 Trust and Dick's Estate against Sue for her misappropriation of funds from the March 2004 Trust and/or from Dick's Estate, as these claims survived Dick's death. See KRS 386.810(y); 386B.8-160(24); 411.140.

¹⁸ Specifically, the Court of Appeals ruled that the trial court erred in denying Sue's motion for summary judgment, motion for directed verdict, and motion for judgment notwithstanding the verdict on the misappropriation claims, which effectively reversed the jury's verdict.

Appellants; (ii) applied Kentucky law governing the division of marital property outside the context of a divorce proceeding; and (iii) held that Sue could not be liable as a matter of law for misappropriating the Regency Center income held by the March 2004 Trust because such income was “marital property.” The Court of Appeals misconceived the applicable law and overlooked material facts.

Early in their marriage, at Dick’s request, Sue relinquished her dower interest in the Regency Center which Dick had owned prior to their marriage. (PTE 144). This agreement paved the way for Dick’s transfer of the Regency Center to the March 2004 Trust.¹⁹ (See PTE 109, Article 1). The March 2004 Trust declared that the *res* of the trust included the Regency Center and its income, which was for Dick’s exclusive benefit during his lifetime. (See PTE 109, Article 4). This income was deposited into a separate account in the name of the March 2004 Trust.

From 2004 until Dick’s death in 2009, Sue misappropriated the Regency Center funds by: (i) forging Dick’s signature on Regency Center checks and depositing the funds in her personal bank account and the bank account of her daughter for the use of Sue and her children (VR 6/17/13: R. Getty 11:55:58-11:58:04, 12:01:01-12:05:44; PTE 15; VR 6/26/13: S. Getty 8:44:30-8:45:52); and (ii) covering up her forgeries of Dick’s signature on checks payable to third parties without Dick’s knowledge and authorization from the March 2004 Trust account. (VR 6/17/13: R. Getty 12:09:15-12:13:22; PTE 17; VR 6/27/13: S. Getty 5:15:40-5:18:50)

The Court of Appeals claimed that Rich provided no legal theory supporting his civil claim against Sue for spousal theft and misappropriation. On the contrary, Rich asserted a number of causes of action against Sue for wrongfully misappropriating the

¹⁹ During his lifetime, Dick was the Grantor, Trustee, and beneficiary of the March 2004 Trust. [PTE 109].

Regency Center income, including: breach of fiduciary duty, fraud and deceit, conversion, civil conspiracy, aiding and abetting fraud and deceit, and theft by failure to make required disposition of property under KRS 514.070, in conjunction with KRS 466.070. (RA 6115-6277) The Court of Appeals also ignored the fact that at the time of Sue's misappropriations of the Regency Center funds, she was acting as Dick's attorney-in-fact under powers of attorney.²⁰ (PTE 107 & 110) Because Sue's actions as Dick's attorney-in-fact were subject to an "utmost good faith" standard, it would have been appropriate for the Court of Appeals to have evaluated the misappropriation claims as a breach of fiduciary duty (or as one of the other causes of action asserted).²¹ See *Ingram v. Cates*, 74 S.W.3d 783, 787 (Ky. App. 2002).

The Court of Appeals nevertheless evaluated the misappropriation claims as spousal theft and applied "marital property" law, specifically KRS 403.190, in reversing the jury's verdict. The Court of Appeals determined that, pursuant to KRS 403.190(2) and (3), while the Regency Center remained Dick's separate property, the income generated by the Regency Center and held by the March 2004 Trust qualified as marital property when Sue expended it. Because spouses co-own marital property until the dissolution of the marital estate under KRS 403.190, according to the Court of Appeals,

²⁰ "A power of attorney is a written, often formally acknowledged, manifestation of the principal's intent to enter into [a fiduciary relationship] with a designated agent' where the agent acts on the principal's behalf and subject to the principal's control." *Select Portfolio Servicing, Inc. v. Blevins*, 494 S.W.3d 510, 514 (Ky. App. 2016) (citation omitted) (brackets in original).

²¹ To prevail on a breach of fiduciary duty claim, one must prove: (i) the existence of a fiduciary duty; (ii) breach of that duty; (iii) injury; and (iv) causation. See *Baptist Physicians Lexington, Inc. v. The New Lexington Clinic, P.S.C.*, 436 S.W.3d 189, 193 (Ky. 2013).

Sue could not have stolen or otherwise misappropriated the Regency Center income from either the March 2004 Trust or from Dick's Estate.²²

The flaw with this reasoning of the Court of Appeals is that the "marital property"/"non-marital property" dichotomy governed by KRS 403.190 is limited, by its own language, to proceedings involving the dissolution of marriage. *See, e.g., First Union Home Equity Bank, N.A. v. Bedford Loan & Deposit Bank*, 111 S.W.3d 892, 895 (Ky. App. 2003) ("In our view, [KRS 403.190] operates only to establish property rights as between spouses in the event of divorce and does not operate to establish rights as between creditors regarding marital property."). Kentucky's "marital property" law has absolutely no application when evaluating the misappropriation claims against Sue as a breach of fiduciary duty (or under any other causes of action asserted). Indeed, in this situation where an attorney-in-fact, who happened to be the spouse of the principal, misappropriated the principal's funds, the Court of Appeals applied "marital property" law in order find the attorney-in-fact/spouse not liable for the misappropriation as a matter of law. There is absolutely no authority in Kentucky supporting the Court of Appeals' extension of KRS 403.190 in these circumstances.

Furthermore, the Court of Appeals' application of Kentucky's "marital property" law ignored the undeniable fact as expressed in the language of the March 2004 Trust and by Dick's own words that he never intended for the Regency Center or the income it generated to be accessible by Sue or to be treated as marital funds. Had Dick intended for

²² The Court of Appeals found this despite KRS 514.020(2) providing that "[i]t is no defense that theft was from the actor's spouse, except that misappropriation of household and personal effects **or other property normally accessible to both spouses** is theft only if it involves the property of the other spouse and only if it occurs after the parties have ceased living together." (emphasis added). The Court of Appeals ignored the evidence establishing Dick's intent that the *res* of the March 2004 Trust—including the Regency Center income—was not to be accessible by Sue.

the Regency Center funds to be treated as marital funds, he would not have requested Sue to relinquish her dower interest in the Regency Center, he would not have gone through the trouble of setting up the March 2004 Trust, and he would not have provided in the March 2004 Trust that the trust income was to be used for his sole benefit.²³ Illustrative of the fact that the Regency Center income was not marital, Dick referred to the Regency Center income as “my money.” (PTE 65, PLTFS 6962, Track 2, 6:13-7:02) Sue even admitted to trying to hide her misappropriations and that she would be “f*#cking dead” if Dick learned of her misappropriations. (PTE 102)

As per the language of the March 2004 Trust, the Regency Center income was the separate property of the Trust. The evidence of Dick’s intent, combined with the rule of law that “an attorney-in-fact generally holds no legal title to the grantor’s property,” results in the Court of Appeals’ application of Kentucky “marital property” law to this case as having been misguided. *Ingram*, 74 S.W.3d at 786. As it stands, the Court of Appeals’ Opinion regarding Rich’s misappropriation claim against Sue renders powers of attorney and revocable trusts, which are common in estate plans, total nullities.

The evidence demonstrating that Sue did not act with the utmost good faith in misappropriating the Regency Center funds, and therefore breached her fiduciary duty, was substantial. This evidence was more than sufficient to submit the question for the jury. Accordingly, the Court of Appeals’ Opinion with respect to Rich’s misappropriation claims against Sue should be reversed and the jury verdict reinstated.

²³ Despite its erroneous holding that the Regency Center income was marital property, the Court of Appeals recognized that “property otherwise considered marital may be regarded as separate if it is excluded by valid agreement of the *parties*, not one *party*.” (COA Opinion at 27 (emphasis in original)) It is difficult to imagine that Sue’s relinquishment of her dower interest in the Regency Center at Dick’s request would not constitute such an agreement.

4. The Jury's Verdict Did Not Result From Passion Or Prejudice.

Sue made no showing that the “verdict [was] ‘**palpably or flagrantly**’ against the evidence so as ‘to indicate that it was reached as a result of passion or prejudice.’” *Gibson v. Fuel Transport*, 410 S.W.3d 56, 59 (Ky. 2013) (citation omitted) (emphasis added). As demonstrated herein, there was more than sufficient evidence to support the jury’s verdict on the issues of Dick’s testamentary capacity and Sue’s undue influence and misappropriation, especially when the evidence is viewed most strongly in Appellants favor. See, e.g., *Bierman v. Klapheke*, 967 S.W.2d at 18-19 (Ky. 1998). The fact that the jury awarded only a fraction of the damages sought on the misappropriation claim, outright rejected Appellants’ request for punitive damages, and found in favor of Sue on the wrongful death claim demonstrates that the verdict was devoid of any passion or prejudice. (RA 10195)

Sue argued that the jury acted out of passion or prejudice based on evidence/testimony introduced at trial which did not paint a flattering picture of her behavior.²⁴ The prejudice about which Sue complains is not the type of prejudice the Kentucky Civil Rules, nor evidentiary rules were designed to prevent. As recognized in Kentucky, “[u]nfair prejudice means the *undue* tendency to suggest a decision based on improper consideration; *it does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence.*” *Ten Broeck Dupont, Inc. v. Brooks*,

²⁴ It is ironic that Sue raised the issue of character assassination when one of her primary defense strategies throughout discovery, at trial and on appeal was besmirching the character of Rich Getty. In the Court of Appeals, Sue described Rich as a terrible individual who was at odds with his father and step-mother, referencing the letters and arguments captured on audiotape. (PTE 2, 4, 5; Sue’s Brief No. 1, filed 3/28/16 at 1-2, 4) Passion and prejudice had nothing to do with the verdict. The evidence was overwhelming that Dick lacked capacity, that Sue unduly influenced her husband in an attempt to obtain 100% of his assets and that she misappropriated trust funds to meet her extraordinary spending habits.

283 S.W.3d 705, 716 (Ky. 2009) (quotation & citation omitted) (emphasis added). Sue cannot cry prejudice simply because the jury considered relevant evidence (much of which was in the form of recorded conversations of Sue herself) that may have damaged her defenses and deservedly portrayed her in a bad light. *See Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 427 (5th Cir. 2006) (“‘Unfair prejudice’ as used in Rule 403 is not to be equated with testimony that is merely adverse to the opposing party. Virtually all evidence is prejudicial; otherwise it would not be material.”). The rules governing trial were never intended to shield defendants like Sue from the consequences of their own wrongful conduct.

In *Martine v. Roadcap*, 136 S.W.2d 16, 20 (Ky. 1940), this Court observed: “[I]n seeing and hearing the parties and witnesses testify, the jury [a] had better opportunity to determine the weight to be given their evidence than can the court from a reading of the record. Many things appear in the trial to lend color and weight to the evidence which do not appear in the record.” *Id.* at 19-20. *The jury spent three weeks watching and listening to Sue and it did not believe her.* There is absolutely no support for the suggestion that the jury reached its verdict because of passion or prejudice. Consequently, the verdict of the jury should be reinstated.

5. The Court Of Appeals Erred In Reversing The Sanction Award

Judge Julia Adams²⁵ conducted an evidentiary hearing and entered a Sanction Order finding that Sue and her attorneys acted in bad faith when they preempted a pending request for an autopsy and wrongfully cremated Dick's body pursuant to an

²⁵ The Honorable Julia H. Adams, Senior Status Judge, was appointed to preside over this case on August 2, 2010 following the cremation of Dick Getty before an autopsy could be conducted and the resulting recusal of both sitting judges in the Bourbon Circuit Court. (RA 2107-2108) As a result of family obligations, Judge Adams stepped down right before the trial and Judge Robert McGinnis was appointed to preside over the trial.

Order that was stayed pursuant to the terms of CR 59, CR 62.01 and KRS 426.030 and while alternative testing options and additional appellate remedies were pending. (RA 2507-2509, Appendix 4) “When a court exercises its contempt powers, it has nearly unlimited discretion. ... Consequently, we will not disturb a court’s decision regarding contempt *absent an abuse of discretion*. ‘The test for abuse of discretion is whether the trial [court’s] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principals.’” *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007) (citations omitted, emphasis added). The Court of Appeals erred when it reversed the Sanction Order and Appellants respectfully request that this Court reinstate the Sanction Order and remand the case for entry of attorneys’ fees and costs as provided for in that Order.

Judge Adams devoted considerable time to the issue of whether Sue and her attorneys acted in bad faith when they caused the cremation of Dick Getty’s body before an autopsy could be conducted. On March 18, 2011, more than a year after the cremation, after at least three (3) rounds of briefing and a lengthy evidentiary hearing during which Sue, Carroway and Kevan Morgan were represented by counsel and afforded the opportunity to testify, call witnesses and otherwise defend their actions, Judge Adams issued the 15-page Sanctions Order in which she made factual findings and concluded as a matter of law that Sue and her attorneys destroyed evidence in bad faith. (RA 2507-2509, Appendix 4. A full recitation of the basis for the autopsy request and procedural background may be found in Appellants’ (then Appellees’) Brief No. 2 at 14-20, 55-61)

For purposes of this brief, the Court should note that Bourbon District Court Judge Mary Jane Phelps granted the request for an autopsy on December 30, 2009. (RA 1149) Six days later, on January 5, 2010, Sue filed a Notice of Appeal to the Bourbon

Circuit Court. On January 22, 2010, Appellants filed a motion for an autopsy pursuant to CR 26, 34, and 35 in the action below, which motion was scheduled to be heard on the same date as Sue's appeal. (RA 348-350) Following an expedited briefing schedule and evidentiary hearing conducted on January 29, 2010, Bourbon Circuit Court Judge Robert Johnson entered an Order on February 12, 2010 reversing the District Court's decision. (RA 829-834; 2/12/10 Order) From the bench at the conclusion of the evidentiary hearing which lasted for hours, the Circuit Court also denied Appellants' motion for an autopsy filed in the underlying action. The ultimate Order entered was designated "final and appealable." (*Id.*)

Significantly for purposes of the Sanction Order, Appellants immediately filed a Motion "pursuant to CR 59 and 60 and all other applicable law" specifically requesting that the court reconsider *and stay* its decision and further requesting more limited sampling of hair, nail and bodily fluid prior to the cremation. (RA 765-773) This Motion was *pending* at the time the Circuit Court entered its Order on February 12, 2010. Not only did Appellants expressly request a stay, but their filing of the motion pursuant to CR 59 automatically stayed enforcement of the Circuit Court's ruling on the autopsy issue pursuant to CR 62.01.²⁶ In addition, the Order would not be final for 10 days pursuant to KRS 426.030 and could not be executed upon. *See* KRS 426.030 ("No execution shall issue on any judgment, unless ordered by the court, until after the expiration of ten days from the rendition thereof."). Although their acts would not be discovered for several more days, immediately after this hearing, Sue and her counsel instructed the funeral home to obtain the body from the Fayette County Coroner's Office and to cremate it

²⁶ CR 62.01 provides that a motion to "alter, amend or vacate a judgment made pursuant to Rule 59...shall operate to stay the execution of or any proceedings to enforce a judgment pending the disposition of any such motion or motions...."

pursuant to the Circuit Court's Order, *which they wrongfully represented as a final order that could be acted upon* when it was stayed by operation of law and was of no force and effect by statute. (VR 6/21/13: C. Forsythe 2:12:50-2:16:20; VR 6/28/13: C. Carroway 10:31:15-10:32:02) The destruction of the body took place on Saturday, February 13, 2010, without notice to Appellants, their counsel or the Circuit Court, ensuring that no autopsy would ever be performed and no samples would ever be tested, regardless of the outcome of the pending motions and/or appeals related to the District Court matter or the Circuit Court proceedings.

The Court of Appeals based its reversal on the erroneous position that an Order denying a discovery request "is not a final judgment on the merits regardless of whether the court designates it as such" and that Appellants were not permitted to file any motion pursuant to CR 52.02, CR 59.05 or CR 62.01, accordingly no stay was in place. (COA Opinion at 16) In other words, the Court of Appeals held that despite the fact that the Order stated it was final, Appellants should have known that the Circuit Court could not designate it as such and Appellants should have known they could not file a motion pursuant to CR 59. This ruling was in error and says nothing of the fact that the Order was not of any force or effect pursuant to KRS 426.030 when Sue and her attorneys falsely represented that it could be acted upon.

CR 54 provides that a trial court "may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay." In *Lexington Herald-Leader Co. v. Beard*, 690 S.W.2d 374, 376 (Ky. 1984), this Court held that, as a general matter, discovery orders should not be immediately appealed because it would "create intolerable delay and unmitigated chaos

in the progress of the litigation.” The Court based its holding on the distinction between a general discovery order and an order which is “irreversible” and is “final in character even though there is another issue in the case,” the latter of which should be designated “final and appealable.” *Id.* Here, the Order was not a general discovery order; rather, it was an order which, when acted upon, was “irreversible” and “final in character.” As Judge Johnson explained during the March 4, 2010 Hearing, he had planned to include the “final and appealable” language in the Order because “in this Court’s mind, it was final.”²⁷ The cremation of a body is the ultimate “irreversible” action. For this reason, pursuant to CR 54 and *Beard*, it was entirely appropriate for Judge Johnson to designate the Order as “final and appealable,” and Appellants filing of a CR 59.05 motion stayed the effect of that Order.

The Court of Appeals’ Opinion reversing the Sanction Order is clearly erroneous and invites litigants to disregard the language of court rules and orders, ignore the standard path for judicial review, and make an independent determination about whether the trial court has authority to make its ruling. Accordingly, Appellants request that the Court reinstate the Sanction Order and remand the case for entry of attorneys’ fees and costs as provided for in that Order.

6. Court Should Reverse The Trial Court’s Denial Of A Supplemental Judgment

When conferring over jury instructions during the trial, the trial court and the parties agreed that no instruction would be given to the jury on Appellants’ claim for repayment of trust funds owed for the period following Dick’s death and that, instead, because these claims involved equitable relief, this issue would be reserved for

²⁷ RA, 3/4/10 Hearing 12:45:00-12:59:09.

determination by the court in the event the jury invalidated the 2008 documents. (RA 11587)

As a result of the jury verdict invalidating the 2008 documents, the Regency Center was restored as the property of the 2004 Trust as it had been at all times since March 22, 2004. Under the terms of Articles 7, 8 and 9 of the 2004 Trust, the trust property, including but not limited to the Regency Center income, is essentially to be divided into three (3) equal shares and distributed to the beneficiaries of the 2004 Trust, Sue, Rich and Sesamie. (PTE 84) Because Sue had been receiving all the income from the Regency Center under the now invalidated 2008 estate plan, Appellants filed a Motion for Entry of Judgment on their Claims for Equitable Relief for the Period Following the Death of Richard J. Getty (2010, 2011, 2012 and 2013) on July 12, 2013. (RA 10237-10247) After reviewing the briefs and conducting a hearing on September 20, 2013, the trial court granted the motion and awarded Appellants equitable relief in the amount of \$403,491.00 for the period of 2010, 2011, 2012 and through September 30, 2013. (RA 11597) The trial court made specific factual findings that Appellants were entitled to equitable relief and Sue did not appeal those findings. (RA 11595-11598, Appendix 1)

Appellants sought damages through September 30, 2013, anticipating that judgment would be entered at or around the end of September. The parties tendered separate proposed judgments on or about October 9, 2013; however, the Final Order and Judgment Upon Jury Verdict ("Order and Judgment") was not entered until January 7, 2014. By that time, three more months of damage had accrued as Sue continued to

receive 100% of the Regency Center proceeds, including the 2/3 share that rightfully belonged to Rich and Sesamie.

To recoup the equitable relief they were entitled to during this interim period due to the delayed entry of the Judgment, Appellants filed a motion requesting that the trial court make additional findings relating to damages accruing between September 30, 2013 and entry of the Final Order and Judgment. (RA 11730-11743) The Kentucky Supreme Court has stated that “a trial court has ‘**unlimited power** to amend and alter its own judgments.’” *Gullion v. Gullion*, 163 S.W.3d 888, 891-92 (citing *Henry Clay Mining Co. v. V & V Min. Co.*, 742 S.W.2d 566 (Ky. 1987)) (emphasis added). *See also* 52.02.²⁸

Special Judge McGinnis conducted a hearing on March 7, 2014. Despite his earlier finding that Appellants were entitled to equitable relief for the period of 2010 through September 30, 2013, Judge McGinnis denied the motion to amend the Judgment to account for damages accruing after September 30, 2013, a decision that cost Appellants nearly \$70,000. (Appendix 2) Judge McGinnis’ justification for refusing to grant the relief was that the parties could not agree on the terms of the Judgment, thereby causing the delayed entry. (VR 3/7/14 Hearing at 10:24:05) In other words, Judge McGinnis imposed a monetary punishment on Appellants for not agreeing to the Judgment language proposed by Sue even though Judge McGinnis ultimately rejected Sue’s proposed Judgment as not being in conformity with the trial court’s ruling and signed *the Appellants’ proposed Judgment instead*. The effect of the Judge McGinnis’ ruling was to deny Appellants their rightful entitlement of 2/3 of the Regency Center

²⁸ CR 52 applies in situations, like this one, where the court is the fact-finder because the claims are equitable in nature. *See* CR 52.01 (referring to findings made by the court in granting or refusing to grant injunctive relief).

income for a period of 6 months (October 2013-March 2014) in the approximate amount of \$70,000 and provide an unjust windfall to Sue who was found to have wrongfully misappropriated Trust funds.

Having previously found that Appellants were entitled to equitable relief (RA 11586-11599), the trial court's decision was not supported by *any* evidence (much less substantial evidence) and was clearly erroneous. *See Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998) ("A factual finding is not clearly erroneous if it is supported by substantial evidence."). The trial court's conclusions of law, such as they are, are subject to independent *de novo* appellate determination. *A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999); *Gosney v. Glenn*, 163 S.W.3d 894, 898-99 (Ky. App. 2005).

Because the trial court lacked any legal or factual basis for denying equitable relief it had already determined was appropriate, this Court should reverse the denial of the Motion for Entry of Supplemental Judgment to Account for Additional Amounts Accrued on Their Claims for Equitable Relief for the Period Following the Death of Richard J. Getty (2010, 2011, 2012, 2013 and 2014) and remand the case for entry of Judgment in favor of Appellants on these amounts.

7. This Court Should Reverse The Denial Of The Bill Of Costs

This Court has held that the "prevailing party," for the purposes of awarding costs and attorney fees, is one who is successful with regard to the main issues in the action." *Lewis v. Grange Mut. Cas. Co.*, 11 S.W.3d 591, 594 (Ky. App. 2000). Unquestionably, the Appellants are the "prevailing parties" entitled to recover their costs. Appellants timely filed their Bill of Costs seeking an award in the amount of \$44,819.55. (RA 11982-11282) The trial court denied the Bill of Costs finding, in the written order,

that “both sides prevailed on very important issues” and that each party should “be responsible for their own costs.” (RA 12027)

A trial court’s decision regarding “whether to award costs and attorney’s fees to a party is within its sound discretion and its decision will not be disturbed on appeal absent an abuse of discretion.” *Giocalone v. Giocalone*, 876 S.W.2d 616, 620-21 (Ky. App. 1994) (citation omitted). Here, the decision should be reversed because Sue did not timely serve her exceptions, and the standard applied by the trial court, i.e. whether both parties prevailed on ‘important issues,’ is not the correct standard for imposition of costs.

CR 54.04(2) provides, “[i]f ***within five days after such service no exceptions to the bill are served*** on the prevailing party, ***the clerk shall endorse*** on the face of the judgment the ***total amount of costs recoverable*** as a part of the judgment.” (Emphasis added). Below, the trial court initially entered a Judgment Upon Jury Verdict on August 9, 2013, and the Appellants served their Bills of Costs on August 19, 2013. (RA 11982-11282) Sue served exceptions on January 14, 2014, well outside the 5 day time limit set by the civil rule. (RA 11807-11819) Accordingly, the exceptions were untimely and should not have been considered by the trial court.

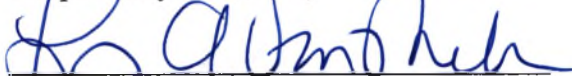
As to the second ground, Appellants were clearly the successful party with regard to the main issues in the case and are entitled to entry of Judgment on their Bill of Costs. After denying Appellants’ Bill of Costs, Judge McGinnis stated that the undue influence claim “really is the main issue in this case...” (VR 3/7/14 Hearing at 10:35:05) Having essentially acknowledged that Appellants prevailed on the main issues in the case, it was an abuse of discretion for the trial court to deny entry of the Bill of Costs.

This Court should reverse the trial court's denial of entry of Bill of Costs and remand the case with instructions for the clerk to endorse the face of the judgment with costs in the amount of \$44,819.55.

CONCLUSION

For the reasons set out herein, Richard A. Getty, Sesamie Bradshaw and Errol Cooper respectfully request that the Court reverse the Opinion of the Court of Appeals and reinstate the jury verdict and Judgment of the trial court on the issues of unsound mind and undue influence, reverse the Opinion of the Court of Appeals and reinstate the Sanction Order, remand the case with instructions for the trial court to award equitable relief to Appellants for damages accruing between September 30, 2013 and entry of the Final Order and Judgment, remand the case with instructions for the clerk to impose costs in favor of Appellants in the amount of \$44,819.55 and remand the case with instructions for the trial court to enter damages for attorneys' fees and costs as provided for in the Sanction Order.

Respectfully submitted,



William M. Lear, Jr.

John W. Bilby

Lucy A. VanMeter

300 West Vine Street, Suite 2100

Lexington, Kentucky 40507

(859) 231-3000 telephone

(859) 253-1093 facsimile

COUNSEL FOR APPELLANTS